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**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF CALIFORNIA**

In Re DMCA Subpoena to Reddit, Inc.

:)	
:)	CASE NO. 3:19-mc-80005-SK
:)	
:)	Watch Tower Bible and Tract Society of
:)	Pennsylvania's Opposition to Electronic
:)	Frontier Foundation's Motion For De
:)	Novo Determination of Dispositive
:)	Matter Referred to Magistrate Judge

Table of Contents

I. INTRODUCTION	5
II. ARGUMENT	6
1. Darkspilver Is Not Entitled to De Novo Review of the Magistrate Judge’s Order.	6
2. Should the Court Entertain This Motion for Reconsideration, Darkspilver’s Motion to Quash Should Be Summarily Denied.	9
A. Darkspilver’s motion to quash is time-barred.	9
B. Foreign nationals with no physical presence in the United States do not enjoy First Amendment rights.	10
C. Darkspilver did not satisfy his burden of proof on the motion to quash.	11
D. A Federal Court cannot conduct a religious inquiry.	15
E. Watch Tower asserted a good faith DMCA-compliant copyright infringement notice because Darkspilver’s use of Watch Tower’s works is not fair use.	17
III. CONCLUSION.....	23

Table of Authorities

Cases

<i>AmTrust N. Am., Inc. v. Safebuilt Ins. Servs.</i> , No.2:16-mc-0145 KJM AC, 2016 U.S. Dist. Lexis 134879, 2016 WL 5469257 (E.D.Cal. Sept. 28, 2016).....	9
<i>Arista Records LLC v. Doe</i> , 604 F.3d 110, 118 (2d. Cir. 2010).....	5
<i>Art of Living Found. v. Doe</i> , No. 10-Civ-05022-LHK, 2011 WL 5444622 (N.D. Cal. Nov. 9, 2011).....	13, 14
<i>Ass'n of Am. Med. Colleges v. Cuomo</i> , 928 F.2d 519 (2d Cir. 1991)	23
<i>Disney Enters. v. VidAngel, Inc.</i> , 869 F.3d 848 (9th Cir. 2017).....	20, 23
<i>Dornell v. City of San Mateo</i> , No. CV 12-06065-CRB (KAW), 2013 U.S. Dist. LEXIS 142335, 2013 WL 5443036 (N.D.Cal. Sept. 30, 2013).....	9
<i>Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.</i> , 499 U.S. 340 (1991)	22
<i>Freed v. Home Depot U.S.A., Inc.</i> , Case No. 18cv359-BAS (LL), 2019 U.S. Dist. Lexis 23736, 2019 WL 582346 (S.D.Cal. Feb. 13, 2019).....	12
<i>Harper & Row v. Nation Enterprises</i> , 471 U.S. 539 (1985)	21
<i>Highfields Capital Mgmt. L.P. v. Doe</i> , 385 F. Supp. 2d 969 (N.D. Cal. 2004).....	11
<i>Hustler Magazine, Inc. v. Moral Majority</i> , 796 F. 2d 1148 (9th Cir. 1986)	22
<i>In re Automobile Antitrust Cases I&II</i> , 135 Cal. App. 4th 100 (Ct. of Appeal of Cal., 1st App. Dist., Div. 4, Dec. 22, 2005).....	12
<i>Lenz v. Universal Music Corp.</i> , 815 F.3d 1145 (9th Cir. 2016).....	5, 23
<i>Paul v. Watchtower Bible & Tract Soc.</i> , 819 F. 2d 875 (9th Cir. 1987)	14, 16
<i>Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.</i> , 923 F. Supp. 1231 (N.D. Cal. 1995).....	22
<i>Roell v. Withrow</i> , 538 US 580 (2003)	7
<i>Signature Mgmt. Team, LLC v. Automattic, Inc.</i> , 941 F. Supp. 2d 1145 (N.D.Cal. 2013) ..	12, 14
<i>Trump v. Hawaii</i> , 138 S.Ct. 2392 (2018)	10, 11
<i>United States v. Ballard</i> , 322 U.S. 78 (1944).....	16
<i>Wis. v. Yoder</i> , 406 U.S. 205 (1972)	16
<i>Worldwide Church of God v. Philadelphia Church of God, Inc.</i> , 227 F. 3d 1110 (9th Cir. 2000).....	19, 21

Statutes

17 U.S.C. § 107.....	19, 21, 22, 23
----------------------	----------------

1	17 U.S.C. § 512.....	5, 17, 18
2	17 U.S.C. §501.....	17
3	28 U.S.C. § 636.....	6
4	Other Authorities	
5	Standing Order for Magistrate Judge Sallie Kim.....	7, 8
6	Rules	
7	Fed. R. Civ. P. 8.....	18
8	N.D. Cal. Civ. L.R. 1-4.....	8
9	N.D. Cal. Civ. L.R. 73-1	6
10		
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I. INTRODUCTION

Darkspilver states, “This is an attempt by Watch Tower to use the Digital Millennium Copyright Act (“DMCA”) to uncover the true identity of an anonymous online commentator, not to pursue a legitimate copyright case.” D.E. 20, at 1:2-5. If this were true, and there was no basis for Watch Tower’s claim of copyright infringement, then the appropriate remedy for Darkspilver would have been to file a 17 U.S.C. § 512(f) Misrepresentation claim. But Darkspilver knows he cannot avail himself of this because: 1) he infringed Watch Tower’s copyrighted works, and 2) well established law in this Circuit for §512(f) claims, only requires that copyright owners consider fair use before issuing a DMCA infringement notice. *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

Watch Tower considered fair use before issuing a DMCA infringement notice. When Darkspilver crossed the line from commentary to using Watch Tower’s intellectual property, Watch Tower’s team of attorneys and other forensic professionals reviewed a number of possible infringements and decided that those underlying the present subpoena were not fair uses of Watch Tower’s copyrighted works. They chose not to pursue the others. Thus, Watch Tower complied with the law in this Circuit. Upon review of the record evidence, Judge Kim could not unequivocally hold that Darkspilver’s use of Watch Tower’s work constituted fair use.

Confronted with a good faith DMCA infringement notice, and the reality that “[t]he First Amendment does not [] provide a license for copyright infringement”, Darkspilver demands nonetheless, that this Court ignore wholesale uses of Watch Tower’s copyrighted works because his uses of Watch Tower’s works under a caption were intended to “evoke conversation”. Order Regarding Motion to Quash Subpoena (hereinafter “Order”), D.E. 18, at 15:15-17; *Arista Records LLC v. Doe*, 604 F.3d 110, 118 (2d. Cir. 2010)(citations omitted). If federal courts endorsed this position, then anyone could take an entire copyrighted work and display it,

1 knowing that if they are later sued for infringement, they can simply claim that they intended to
 2 evoke conversation.

3 Finally, Darkspilver succeeded in obtaining an order based on an unconstitutional
 4 excursion into religious doctrine, practice, and internal governance by claiming that compliance
 5 with the subpoena will result in religious “harms”. By so doing, he creates the prospect that all
 6 future subpoena applications by Watch Tower will be thwarted simply by the infringer’s
 7 assertion of religious “harm”. If Darkspilver is successful, his case will effectively provide
 8 future copyright infringers a license to blatantly infringe copyrights. It will also provide
 9 infringers a means to get around the well-established Ninth Circuit law by requiring that
 10 copyright owners not only consider fair use, but also litigate the absence of fair use without the
 11 benefit of discovery, *before* they are allowed to file an infringement suit. Lastly, his case will
 12 establish that simply raising the specter of religious “harm” will quash legally obtained
 13 subpoenas. His motion to quash should therefore be denied.

16 **II. ARGUMENT**

17 ***1. Darkspilver Is Not Entitled to De Novo Review of the Magistrate Judge’s Order.***

18 Darkspilver’s implied consent to Judge Kim’s authority to decide the motion to quash
 19 bars his request for *de novo* review of Judge Kim’s order. Darkspilver should have filed a
 20 notice of appeal to the Court of Appeals of the Ninth Circuit. Notwithstanding, he improperly
 21 invokes 28 U.S.C. § 636(b)(1) in an effort to get another bite at the apple.

23 U.S. District Court Northern District of California Civil Local Rule 73-1 states,

24 In cases that are initially assigned to a magistrate judge, unless the Clerk of the Court or
 25 the magistrate judge has set a different deadline in an individual case: (1) *Parties must*
 26 *either file written consent to the jurisdiction of the magistrate judge, or request*
 27 *reassignment to a district judge*, by the deadline for filing the initial case management
 28 conference statement. (2) If a motion that cannot be heard by the magistrate judge
 without the consent of the parties, pursuant to 28 U.S.C. § 636(c), is filed prior to the
 initial case management conference, *the parties must either file written consent to the*
jurisdiction of the magistrate judge, or request reassignment to a district judge, no later
than 7 days after the motion is filed.

(emphasis added). Darkspilver never requested reassignment of the motion to quash to a district judge.

Judge Kim's Standing Order states,

In civil cases randomly assigned to Judge Kim for all purposes, the parties should file their written consent to the assignment of a United States Magistrate Judge for all purposes or their written declination of consent as soon as possible, and in no event later than the deadlines specified in Civil L.R. 73-1(a)(1) and (2).

Standing Order for Magistrate Judge Sallie Kim (hereinafter "J. Kim Standing Order"), at 2.

Watch Tower filed its consent on January 14, 2019. *See* Consent/Declination to Proceed Before a US Magistrate Judge by Watch Tower, D.E. 5. Darkspilver never declined consent to assignment of the case to Judge Kim. Having never requested reassignment of his motion to quash to a district judge, having never submitted a written declination to the assignment of the case to a Magistrate Judge, and having fully briefed and argued the matter, Darkspilver gave implied consent to assignment of this matter to Judge Kim.

In *Roell v. Withrow*, faced with a similarly strategic litigant, the Supreme Court concluded that a bright line rule requiring written declination to assignment of a magistrate judge "would allow parties . . . to sit back without a word about their failure to file the [consent] form, with a right to vacate any judgment that turned out not to their liking." 538 US 580, 590 (2003). The Court continued, "Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." *Id.* Thus, the Supreme Court held, "We think the better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need to consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge." *Id.* at 589.

While in the present case, there was no trial in the traditional sense, as Darkspilver acknowledges, "Doe's motion to quash the DMCA subpoena obtained by Watch Tower is a

1 dispositive motion the resolution of which determines with finality the duties of the
2 parties.” Electronic Frontier Foundation’s Motion for *De Novo* Determination of Dispositive
3 Matter Referred to Magistrate Judge, D.E. 20, at 6:16-25. Furthermore, Judge Kim used the
4 evidence before her to draw factual and legal conclusions. *See e.g.* Order, at 12:28-13:1-2
5 (“The Court finds that Darkspilver has demonstrated significant harms if his identity were
6 revealed publicly or even if it were revealed to Jehovah’s Witnesses in his congregation.”)
7 Furthermore, Darkspilver had a duty to follow the Local Rules and Judge Kim’s Standing Order
8 requiring written declination of consent to assignment of a Magistrate Judge. *See* N.D. Cal.
9 Civil L.R. 1-4 (“Failure by counsel or a party to comply with any duly promulgated local rule or
10 any Federal Rule may be a ground for imposition of any authorized sanction.”); *see also* J. Kim
11 Standing Order, at 1 (“The parties’ failure to comply with any of the rules or orders may be
12 grounds for monetary sanctions, dismissal, entry of judgment, or other appropriate sanctions.”)
13

14
15 When Darkspilver presented oral argument before Judge Kim, he did not object to Judge
16 Kim’s assignment to this matter nor did he request that this matter be reassigned to a district
17 judge. Thus, Judge Kim issued an Order – not a Report and Recommendation. Clearly, Judge
18 Kim properly understood that Darkspilver consented to her assignment to decide the motion to
19 quash. Accordingly, the Court ordered Reddit “to respond to the subpoena and provide the
20 requested information to Watch Tower’s counsel”, and ordered Watch Tower to seek further
21 “approval in a Court Order from *this Court*” before using the data to pursue its copyright
22 infringement action. Order, at 17:15-18 (emphasis added). As such, the principle of the *Roell*
23 decision applies.
24

25 Because Darkspilver did not get the decision that he hoped for, he now files this request
26 for *de novo* review in order to get a second bite at the apple, rather than properly appeal to the
27 United States Court of Appeals for the Ninth Circuit. Having consented to Judge Kim’s
28 authority, he has no right to *de novo* review. His only remedy is to file a Notice of Appeal, and

1 his time to do so has not yet passed.

2
3 ***2. Should the Court Entertain This Motion for Reconsideration, Darkspilver's Motion to Quash Should Be Summarily Denied.***

4 **A. Darkspilver's motion to quash is time-barred.**

5 "It is well settled that, to be timely, a Motion to Quash a subpoena must be made prior to
6 the return date of the subpoena." *AmTrust N. Am., Inc. v. Safebuilt Ins. Servs.*, No.2:16-mc-
7 0145 KJM AC, 2016 U.S.Dist. Lexis 134879, *5, 2016 WL 5469257 (E.D.Cal. Sept. 28,
8 2016)(citations omitted). Judge Kim incorrectly concluded that "the authority upon which
9 Watch Tower relies applies to parties." Order, at 5:18.

10
11 To the contrary, parties do not issue Fed. R. Civ. P. 45 subpoenas to other parties.
12 Subpoenas are only issued to non-parties. In both of the cases cited by Watch Tower on this
13 point, the subpoenas at issue were non-party subpoenas. *See AmTrust N. Am., Inc.*, 2016 WL
14 5469257, *1 ("This is a Miscellaneous Case involving a deposition subpoena . . . directed to
15 non-party Jeff Hohlbein."); *see also Dornell v. City of San Mateo*, No. CV 12-06065-CRB
16 (KAW), 2013 U.S. Dist. LEXIS 142335, *4, 2013 WL 5443036 (N.D. Cal. Sept. 30,
17 2013)(deciding motion to quash non-party subpoenas issued to plaintiff's physicians and
18 employer).

19
20 The return date of the subpoena was February 15, 2019. Order, at 5:21-22. Judge Kim
21 erroneously stated that Darkspilver "did not even have notice of the subpoena until after that
22 date, on February 22, 2019." *Id.* Paragraph 7 of Darkspilver's declaration filed in support of
23 his motion to quash clearly states, "On February 7, 2019, I received a notice from Reddit of a
24 subpoena for identifying and usage information associated with my user account." Declaration
25 of John Doe (Darkspilver) in Support of Motion to Quash Watchtower (*sic*) Bible & Tract
26 Society Inc.'s Subpoena to Reddit, Inc. Seeking Identifying Information (hereinafter
27 "Darkspilver Decl."), D.E. 8-1, at 3:15-17. Thus, Darkspilver admits that he had notice of the
28

1 subpoena over a week *before* the return date.

2 Darkspilver could have filed a *pro se* motion to quash, or even a letter to the court
3 requesting an extension of the deadline. Darkspilver could have requested that Watch Tower
4 extend the return date for the subpoena, or could have asked Reddit to request an extension on
5 his behalf. His failure to do any of those things renders his motion to quash time-barred.
6

7 **B. Foreign nationals with no physical presence in the United States do not enjoy First
Amendment rights.**

8 Darkspilver is not a U.S. citizen. Darkspilver Decl., at 3:5. He is not a U.S. resident. *Id.*
9 He has no physical ties to the United States. *Id.* Notwithstanding these facts, the foundation of
10 his motion to quash lies on the erroneous conclusion that aliens abroad enjoy First Amendment
11 protections. Judge Kim ruled in favor of that argument citing no case in the history of
12 American jurisprudence that permits such a broad application of the First Amendment. In
13 contrast, the idea that the First Amendment does not apply to foreign nationals abroad has
14 support. In *Trump v. Hawaii*, Justice Thomas, citing the Supreme Court’s decision in *U.S. v.*
15 *Verdugo-Urquidez*, stated, “The plaintiffs cannot raise any other First Amendment claim, since
16 the alleged religious discrimination in this case was directed at aliens abroad.” 138 S. Ct. 2392,
17 2424 (2018) (Thomas, J., concurring)(citations omitted). Justice Thomas’s statement clearly
18 presupposes that: 1) aliens abroad do not enjoy First Amendment rights, and 2) that U.S. citizen
19 plaintiffs could not assert a First Amendment discrimination claim on behalf of aliens abroad.
20

21 In *Trump v. Hawaii*, U.S. citizens challenged the constitutionality of an Executive Order
22 restricting the entry of certain foreign nationals from six countries because “it was motivated
23 not by concerns pertaining to national security but by animus toward Islam.” *Id.* at 2406. The
24 Court noted the dilemma posed by the fact that “the entry restrictions apply not to plaintiffs
25 themselves but to others seeking to enter the United States”. *Id.* at 2416. The only reason that
26 the Court proceeded to decide the First Amendment claim was because, “[t]he three individual
27
28

1 plaintiffs assert another, more concrete injury: the alleged real-world effect that the
2 Proclamation has had in keeping them separated from certain relatives who seek to enter the
3 country.” *Id.*

4 In the present case, no U.S. citizen asserted a First Amendment right to hear the alleged
5 speech uttered by Darkspilver in connection with the infringements at issue. The only alleged
6 speech interest at issue here is the alleged speech interest of Darkspilver, who has no legal basis
7 for asserting First Amendment protection. Since Darkspilver does not himself enjoy First
8 Amendment protection, he also does not have standing to raise a First Amendment objection
9 based on the First Amendment rights of others.
10

11 If Judge Kim’s view is adopted by this Court, then any person, anywhere in the world,
12 could assert a First Amendment right based on a simple allegation that there is a potential U.S.
13 audience for the person’s speech, or the simple fact that the person used a U.S.-based platform
14 to utter the speech. Such a broad and sweeping application of U.S. Constitutional law is
15 unfounded.
16

17 **C. Darkspilver did not satisfy his burden of proof on the motion to quash.**

18 The entire basis for Darkspilver’s motion to quash is that enforcement of the subpoena
19 will result in a specifically-alleged harm to Darkspilver – notably that Darkspilver will be
20 disfellowshipped if Reddit complies with the subpoena¹. Citing *Highfields Capital Mgmt. L.P.*
21 *v. Doe*, 385 F. Supp. 2d 969 (N.D. Cal. 2004), Darkspilver argues that the “harm” of shunning
22 must be weighed in the balance against the harm to Watch Tower if the subpoena is not
23

24 ¹ Darkspilver briefly mentioned that if Watch Tower learns his identity, it will chill his speech.
25 See Darkspilver Decl., at 4:27. However, Darkspilver provides no reason why he cannot
26 continue to voice his concerns about Watch Tower using a different screen name. To be clear,
27 the only reason Watch Tower had the ability to subpoena Reddit for Darkspilver’s identity is
28 because Darkspilver infringed Watch Tower’s copyrights – not because Darkspilver voiced
opinions about Watch Tower. If, moving forward, Darkspilver simply voices his opinions about
Watch Tower using a different screen name or even the same screen name, there would be no
way for Watch Tower to know if it is actually the same person rather than a copycat.

1 enforced. He contends that the “harm” imposed by disfellowshipping far outweighs any harm
 2 to Watch Tower that would be created by quashing the subpoena – notably that Watch Tower
 3 will not be able to file suit for Darkspilver’s copyright infringements and conduct discovery.
 4 *See Signature Mgmt Team, LLC v. Automattic, Inc.*, 941 F. Supp. 2d 1145, 1157 (N.D. Cal.
 5 2013) (holding that the copyright holder “has an interest in obtaining [the infringer’s] identity to
 6 facilitate a copyright infringement action . . . as personal service will facilitate discovery,
 7 including a potential pre-trial deposition”)

9 Since Watch Tower did not file the present motion, Watch Tower carries no burden to
 10 prove that the harm that it alleges will actually occur. The fact of the infringement establishes
 11 the harm. Darkspilver, on the other hand, “who move[d] to quash [the] subpoena has the burden
 12 of persuasion under Rule 45(c)(3).” *Freed v. Home Depot U.S.A., Inc.*, Case No. 18cv359-BAS
 13 (LL), 2019 U.S. Dist. Lexis 23736, 2019 WL 582346 (S.D. Cal. Feb. 13, 2019). As the movant
 14 for the motion to quash, Darkspilver must prove by a preponderance of evidence that the harm
 15 he claims will result from compliance with the subpoena – namely disfellowshipping– will
 16 actually occur if Reddit complies with the subpoena. *See In re Automobile Antitrust Cases I&II*,
 17 135 Cal. App. 4th 100 (Ct. of Appeal of Cal., 1st App. Dist., Div. 4, Dec. 22, 2005)(noting the
 18 burden of proof on a motion to quash is preponderance of evidence).

20 **i. Darkspilver failed to present sufficient evidence that he will be disfellowshipped.**

21 Darkspilver has not presented a scintilla of evidence, let alone a preponderance of
 22 evidence that the harm he claims will result from compliance with the subpoena will actually
 23 occur. Darkspilver claims that if Watch Tower gains access to his identity, it will disfellowship
 24 him and thereby “damage[e] or destroy[] [his] relationships with friends and family who
 25 remain active members of the Jehovah’s Witness community.” Darkspilver Decl., at 4:26-28,
 26 5:1.
 27

28 As a preliminary matter, Watch Tower has no ability to disfellowship Darkspilver. *See*

1 Declaration of Paul D. Polidoro (hereinafter “Polidoro Decl.”), D.E. 12, at 4:4-5. If however,
2 more consideration is given to this claim of “harm”, Watch Tower takes this opportunity to
3 show why Darkspilver’s claim is fatally flawed.

4 Darkspilver’s claim that if Watch Tower learns his identity, he will be disfellowshipped
5 and shunned by family and friends presupposes three things: 1) that Darkspilver is, in fact, one
6 of Jehovah’s Witnesses, 2) that Darkspilver currently maintains relationships with friends and
7 family who are active members of the Jehovah’s Witness community, and 3) that if Watch
8 Tower learns Darkspilver’s identity, it would disfellowship him. The record evidence is void of
9 any support for these suppositions.
10

11 First, Darkspilver provides no proof that he is, in fact, one of Jehovah’s Witnesses. The
12 fact that Darkspilver was a regular contributor to the self-described Ex-Jehovah’s Witness
13 subreddit for several years lends greater support to the possibility that he is not one of Jehovah’s
14 Witnesses. If Darkspilver is not one of Jehovah’s Witnesses, then he cannot be
15 disfellowshipped from a congregation of Jehovah’s Witnesses, and compliance with the
16 subpoena threatens no “harm”.
17

18 Second, Darkspilver provides no proof that he currently maintains relationships with
19 friends and family who are active members of the Jehovah’s Witness community. If
20 Darkspilver does not actually have current relationships with active members of the Jehovah’s
21 Witness community, then the alleged “harm” has no basis.
22

23 Third, Darkspilver points to no instance in which Watch Tower has ever disfellowshipped
24 a person. He provides no evidence that Watch Tower has ever publicly disclosed the name of a
25 pseudonymous critic or subject of a DMCA subpoena. This is a key distinguishing fact from
26 the facts in *Art of Living Found. v. Doe*, No. 10-Civ-05022-LHK, 2011 WL 5444622 (N.D. Cal.
27 Nov. 9, 2011). In that case, the alleged infringer, Skywalker, “submitted a declaration
28 expressing concern that revealing his identity would “expose [him] and [his] family to

1 harassment and retaliation from loyal adherents of Ravi Shankar.” *Id.* at *9. The Court took
2 notice that “Skywalker support[ed] these contentions with a ‘widely circulated’ internet posting
3 by an AOLFF leader denouncing another ‘dissident’ and disclosing the contact information of
4 acquaintances who could testify that the dissident was ‘unstable.’” *Id.* Similarly, in *Signature*
5 *Mgmt. Team, LLC v. Automattic, Inc.*, the alleged infringer asserted “his concern that he will be
6 harassed and retaliated against by TEAM, including a potential defamation suit” if his identity
7 were disclosed. 941 F. Supp. 2d 1145, 1150 (N.D. Cal. 2013).

9 The harassment and retaliation alleged in *Art of Living* and *Signature Mgmt* were legally
10 cognizable harms. Disfellowshipping or shunning, on the other hand, is not a legally cognizable
11 “harm”. Rather, it is a legally protected exercise of the First Amendment’s free exercise clause
12 that Jehovah’s Witnesses assert is a loving application of Galatians 6:1. *See Paul v.*
13 *Watchtower Bible & Tract Soc.*, 819 F. 2d 875, 883 (9th Cir. 1987). Notwithstanding that
14 important distinction, Watch Tower has no ability to disfellowship Darkspilver. *See Polidoro*
15 *Decl.*, at 4:4-5.

17 In support of his claim that Watch Tower can harm him by disfellowshipping him,
18 Darkspilver provided the Court with three news articles attached to the Alexandra Moss
19 declaration. These articles provide accounts of self-described ex-Jehovah’s Witnesses who
20 claim to have been shunned by friends or family members. None of the people interviewed in
21 these articles, however, claim to have been subjects of a Watch Tower DMCA subpoena. None
22 of the people quoted in these articles claim to have been disfellowshipped for copyright
23 infringement or posting internal Watch Tower documents online. Thus, even if all of the
24 accounts in the three articles were accepted as true, none of the articles prove or lend support to
25 the claim that *Darkspilver* would be disfellowshipped as result of his infringing Watch Tower’s
26 copyrights.

28 Watch Tower, on the other hand, provided Judge Kim and opposing counsel evidence

1 regarding the policy on disfellowshipping in congregations of Jehovah’s Witnesses. This
 2 religious doctrine published on the official website of Jehovah’s Witnesses clearly states, “We
 3 do not automatically disfellowship someone who commits a serious sin.” “Do Jehovah’s
 4 Witnesses Shun Former Members of Their Religion?” *available at:*
 5 <https://www.jw.org/finder?wtlocale=E&docid=502012472&srcid=share> (last viewed June 10,
 6 2019). The article continues,

8 What of a man who is disfellowshipped but whose wife and children are still Jehovah’s
 9 Witnesses? The religious ties he had with his family change, but blood ties remain. *The*
marriage relationship and normal family affections and dealings continue.

10 Disfellowshipped individuals may attend our religious services. If they wish, they may
 11 also receive spiritual counsel from congregation elders. The goal is to help each individual
 12 once more to qualify to be one of Jehovah’s Witnesses. Disfellowshipped people who
 13 reject improper conduct and demonstrate a sincere desire to live by the Bible’s standards
 14 are always welcome to become members of the congregation again.

15 *Id.* Thus, although Watch Tower does not carry the burden of proof on this issue, it submitted
 16 proof contradicting Darkspilver’s unsupported claim that: 1) he will automatically be
 17 disfellowshipped if his local congregation learns his identity, and 2) that all family affections
 18 and dealings will be entirely cut off if he is disfellowshipped.

19 Finally, even if Darkspilver could be disfellowshipped, disfellowshipping is a legally
 20 protected religious doctrine and practice under the Free Exercise Clause of the First Amendment
 21 – not a legally cognizable “harm”. And not to be forgotten is the fact that, Watch Tower has no
 22 ability to disfellowship Darkspilver. *See* Polidoro Decl., at 4:4-5.

23 **D. A Federal Court cannot conduct a religious inquiry.**

24 As Darkspilver’s counsel stated during oral argument, it cannot be ignored that
 25 Darkspilver raised “matters of religious faith and internal conscience.” *See* PDF with attached
 26 Audio File (hereinafter “Oral Argument”), D.E. 17, at minute marker 9:25. By accepting
 27 Darkspilver’s invitation to conduct a religious inquiry, the Court unconstitutionally entangled
 28 itself in matters of religious doctrine, practice, and internal governance. It thereafter issued its

1 order based on religious findings, stating,

2 Nevertheless, Darkspilver has expressed substantial concerns over having his identity
3 revealed to anyone in the Jehovah's Witness community. The Court finds that
4 Darkspilver has demonstrated significant harms if his identity were revealed publicly or
5 even if it were revealed to Jehovah's Witnesses in his congregation.

6 Order, at 12:26-28 – 13:1-2. The First Amendment bars civil court's from issuing an order
7 based on such religious inquiries and findings.

8 The United States Supreme Court has long held that "[h]eresy trials are foreign to our
9 Constitution." *United States v. Ballard*, 322 U.S. 78, 86 (1944). Thus, religious doctrines
10 cannot be subjected to an inquiry of truth or falsity. "When the triers of fact undertake that task,
11 they enter a forbidden domain." *Id.* at 87.

12 Rather than accepting the truth about the nature and effect of the disfellowshipping
13 process as established by the religion's official statements, the Court chose instead to assess the
14 validity of those statements, reject them, and base its decision on Darkspilver's naked
15 assertions. By so doing, the Court ignored well-established law protecting matters of religious
16 doctrine, practice, and internal governance.

17 "The Jehovah's Witnesses' practice of shunning is protected under the first amendment of
18 the United States Constitution." When "members of the Church . . . conclude[] that they no
19 longer want to associate with [someone] . . . [w]e hold that they are free to make that choice."
20 *Paul*, 819 F. 2d at 883. "[T]he values underlying the[] two provisions [of the first amendment]
21 relating to religion have been zealously protected, sometimes even at the expense of other's
22 interests.'" *Id.* at 883 citing *Wis. v. Yoder*, 406 U.S. 205, 214 (1972). "Churches are afforded
23 great latitude when they impose discipline on members or former members. . . . '[R]eligious
24 activities which concern only members of the faith are and ought to be free – as nearly
25 absolutely free as anything can be.'" *Id.* citations omitted.

26 Rather than accept the fact that he was the beneficiary of an unconstitutional analysis,
27
28

Darkspilver continues to resist the Court's order that information about his identity be given to attorneys of record. He resists this because of an attorney's association with Watch Tower. This is nothing more than thinly disguised religious animus, which should be rejected by this Court.

Darkspilver successfully turned a routine copyright dispute into a religious inquiry. And the Court largely ruled in his favor as a result. He now seeks more – solely based on arguments involving questions that incite civil courts to become impermissibly entangled in matters of religious doctrine, practice, and internal governance. This ignores the remedies he had under the DMCA statute. 17 U.S.C. § 512(f). It also ignores the fact that copyright owners that allege a *prima facie* case of copyright infringement are entitled to discover the identity of alleged infringers. 17 U.S.C. § 512(h). Any attempt by the court to withhold such evidence from Watch Tower – a distinct corporate entity that holds intellectual property – on the basis that it has some relation to Jehovah's Witnesses, would in effect be a ruling on impermissible religious grounds. Such an unconstitutional entanglement in religious affairs should not be countenanced. The motion to quash should be denied in its entirety.

E. Watch Tower asserted a good faith DMCA-compliant copyright infringement notice because Darkspilver's use of Watch Tower's works is not fair use.

i. Watch Tower alleged a prima facie copyright infringement claim.

A claim of copyright infringement requires (1) ownership of a valid copyright and (2) violation by the alleged infringer of at least one of the exclusive rights granted to copyright owners by the Copyright Act. *See* 17 U.S.C. §501(a). Watch Tower provided proof of ownership of both the article and chart at issue. *See* Polidoro Decl., at 2:14-17. Darkspilver admitted to wholesale uses of Watch Tower's content. *See* Darkspilver Decl., at 3:18-20, 4:18-13. Thus Judge Kim concluded "that Watch Tower demonstrates a *prima facie* case of copyright infringement with respect to the advertisement" Order, at 12:1-2. The DMCA

requires no more of copyright owners in order to qualify for enforcement of a DMCA subpoena. *See* 17 U.S.C. § 512(h). At this point, this motion to quash should be summarily denied.

ii. A decision on fair use at this juncture is woefully premature.

An affirmative defense such as fair use is properly introduced in responding to a pleading – not before a complaint has been filed. *See* Fed. R. Civ. P. 8(c) (“(1) In General. In *responding to a pleading*, a party must affirmatively state any avoidance or affirmative defense, including: . . .”) emphasis added. In U.S. federal courts, a determination regarding the sufficiency of pleadings and an affirmative defense is rightfully made at the motion to dismiss stage – not before a complaint has been filed. As such, Judge Kim prematurely conducted a fair use analysis.

Another reason why it is improper to entertain an affirmative defense at this preliminary stage is because it is unclear whether U.S. copyright law should be applied in the copyright infringement analysis. Judge Kim acknowledged that the Court may not have jurisdiction over Darkspilver, and Darkspilver declined to submit to personal jurisdiction in the Northern District of California. *See* Oral Argument. Still, the Court applied U.S. law to the substantive issue when it is not clear that the infringement case could be prosecuted in a U.S. court. As such, it is improper for this Court to definitively opine on the issue of fair use when a court, applying the copyright laws of the country where Darkspilver lives may not find that Darkspilver’s use of Watch Tower’s works constitutes fair use. The copyright law in Darkspilver’s country may not have a fair use provision at all.

In the event that this Court is inclined to render an opinion on fair use despite the possible lack of jurisdiction, Watch Tower takes this opportunity to point out why Darkspilver’s uses of Watch Tower’s works are not fair uses under U.S. law.

iii. Purpose and character of the use favors infringement.

The first fair use factor evaluates “the purpose and character of the use, including whether

1 such use is of a commercial nature or is for nonprofit educational purposes.” 17 U.S.C. §
 2 107(1). As the Court stated in *Worldwide Church of God v. Philadelphia Church of God, Inc.*,
 3 “in weighing whether the purpose was for ‘profit,’ monetary gain is not the sole criterion
 4 particularly in a setting where profit is ill-measured in dollars.” 227 F.3d 1110, 1117 (9th Cir.
 5 2000)(citations omitted). The Court further recognized that “like academia, religion is generally
 6 regarded as not dollar dominated.” *Id.* at 1118. The Court rightfully noted that infringers of a
 7 religious organization’s copyrighted works could profit from their use “by attracting through
 8 distribution of [copyrighted materials] new members who tithe ten percent of their income to
 9 [the infringer], and by enabling the [infringer’s] ministry’s growth.”

11 To illustrate, other infringers of Watch Tower’s copyrighted works have been able to
 12 develop a reputation as being a key source of leaked Watch Tower intellectual property. Once
 13 an infringer has amassed enough of a following, he or she can then create accounts on other
 14 profit-generating social media platforms and direct followers from one social media platform
 15 that does not generate profits, to a profit-generating platform (e.g. YouTube). An infringer can
 16 then leverage the size of his or her social media audience to qualify for a higher cut of
 17 advertising revenues from social media companies.

19 Darkspilver self-servingly asserts that he did not profit from his infringing posts on the
 20 Reddit platform. Yet, having developed the reputation as a “prolific leaker” of Watch Tower
 21 content, there is a real possibility that Darkspilver has amassed a following from which he
 22 profits on other social media platforms. *See*
 23 [https://www.reddit.com/r/exjw/comments/bceo70/what_post_caused_the_corporation_to_subpo](https://www.reddit.com/r/exjw/comments/bceo70/what_post_caused_the_corporation_to_subpoena/)
 24 [ena/](#) (last viewed June 11, 2019). At this preliminary juncture, however, Watch Tower has not
 25 had the opportunity to conduct discovery or present the Court with evidence that Darkspilver is
 26 profiting from infringing Watch Tower’s copyrighted works. And it is entirely premature to be
 27 performing this type of analysis because the type and amount of discovery available will be
 28

1 contingent upon where personal jurisdiction over Darkspilver can be secured.

2 “In addressing the first factor, the court [also] asks whether the new work merely
3 supersedes the objects of the original creation, or instead adds something new, with a further
4 purpose or different character; in other words, whether and to what extent the new work is
5 ‘transformative.’” *Disney Enters. v. VidAngel, Inc.*, 869 F.3d 848, 861 (9th Cir. 2017). Judge
6 Kim acknowledged that “Darkspilver did not alter or strongly “transform” the advertisement.
7 He posted it in full with [a] caption.” ORDER, at 15:12-13.

9 With respect to Darkspilver’s motivation for displaying Watch Tower’s copyrighted
10 works, Darkspilver admits, “My purpose in posting the Chart was to provide information to
11 people *in the Jehovah’s Witness community*” – not to comment on the chart, or criticize Watch
12 Tower. Darkspilver Decl., 4:14-1. With respect to the Watchtower article, he states, “I wanted
13 to inform others and spark discussion about the organization’s tone, message, and fundraising
14 practices.” Darkspilver Decl., at 4:2-3. Part of Watch Tower’s purpose in creating the article
15 (otherwise referred to as the advertisement), and the chart was to inform people both in and not
16 in the Jehovah’s Witness community about: 1) how Watch Tower raises funds, and 2) how the
17 data referenced in the chart is handled. Watch Tower’s purpose in creating the article was also
18 to spark discussion about Watch Tower fundraising. Indeed, what publisher of a magazine
19 creates an article with the purpose that no one will talk about it? Clearly, both Watch Tower
20 and Darkspilver shared much of the same purpose in distributing Watch Tower’s content.

23 For Judge Kim, the saving grace of Darkspilver’s argument with respect to the first fair
24 use factor was the *post hoc* claim that his purpose in using Watch Tower’s content was to
25 “evoke conversation” – not actually comment on either of Watch Tower’s works. Such a
26 stretch of the fair use doctrine to permit wholesale use of untransformed copyrighted works is
27 unprecedented and should not be accepted by this Court. If such a stretch of the fair use
28 doctrine were permitted, then the fair use exception would essentially swallow copyright law

1 entirely. All an infringer would ever have to do is baldly argue that they stole the intellectual
2 property to evoke conversation.

3 *iv. Nature of the copyrighted work-factor favors infringement.*

4 The second fair use factor requires an examination of “the nature of the copyrighted
5 work”. 17 U.S.C. 107(2). As noted in *Harper & Row v. Nation Enterprises*, “The law
6 generally recognizes a greater need to disseminate factual works than works of fiction or
7 fantasy.” 471 U.S. 539 (1985). Judge Kim summarily categorized Watch Tower’s article as
8 “largely informational and functional, directing readers how to make donations online.” Order,
9 at 16:1-2. However, Watch Tower’s article titled, “What Gift Can We Give to Jehovah?” was
10 much more than an information guide on how to make donations. The article articulated a
11 religious view of the proper application of scripture. For example, Watch Tower’s article cites
12 Proverbs 3:9 (“Honor Jehovah with your valuable things”) and notes that the appropriate
13 interpretation of this scripture does not only implicate material assets. Rather, the article asserts
14 the notion that the “valuable things” referenced in Proverbs 3:9 also refers to one’s time, talents,
15 and strength. *See* What Gift Can We Give to Jehovah?, available at:

16 <https://www.jw.org/finder?wtlocale=E&issue=2018-11&pub=w18&srcid=share> (last viewed:
17 June 13, 2019). This interpretation of scripture is not just informational or functional. As stated
18 by the Ninth Circuit Court of Appeals in *Worldwide Church of God*, while interpretation of
19 scripture “may be viewed as ‘factual’ by readers who share [the same] religious beliefs”, that
20 interpretation of scripture is precisely the type of creativity the copyright act was intended to
21 protect. 227 F.3d at 1118. Judge Kim’s comment that the article is “largely informational and
22 functional” amounts to an improper evaluation a religious belief. Order, at 16:1-2.

23 Judge Kim did not bother to evaluate the fair use argument regarding the chart having
24 previously decided that Watch Tower “fail[ed] to demonstrate a *prima facie* case of copyright
25 infringement with respect to the chart.” Order, at 11:23-24. Still, Watch Tower here again

1 asserts that the chart is creative in nature. There is nothing in the General Data Protection
2 Regulation that dictated the word-choice or format used to make the chart. The information
3 included in the chart was not pre-existing factual information akin to telephone numbers listed
4 in a phonebook. *See Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 342
5 (1991)(finding that for copyright protection to attach to facts, the “originality is not a stringent
6 standard; it does not require that facts be presented in an innovative or surprising way.”)
7

8 Therefore, consideration of the second fair use factor favors infringement.

9 *v. The amount and substantiality of portion used favors infringement.*

10 The third fair use factor looks to the “the amount and substantiality of the portion used in
11 relation to the copyrighted work as a whole”. 17 U.S.C. § 107(3). As noted by the Ninth
12 Circuit Court of Appeals in *Hustler Magazine, Inc. v. Moral Majority, Inc.*, “A creative work
13 does not deserve less copyright protection just because it is part of a composite work.” 796 F.2d
14 1148, 1155 (9th Cir. 1986). On that basis the Court held, “we view the Defendants as having
15 copied an entire work” where defendant copied 1-page from a 154-page magazine. *Id.* This
16 view was also applied in *Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.*, where the
17 Court stated, “copying an entire article from a journal whose copyright has been registered as a
18 whole still constitutes copying the entire work.” 923 F. Supp. 1231, 1247 (N.D. Cal. 1995).
19

20 Darkspilver admitted that he “reproduced the Ad and Chart in their entirety”. Darkspilver
21 Decl., at 12:18. Still, Judge Kim erroneously held, “even though Darkspilver copied the entire
22 advertisement, it was only a small portion of the copyrighted work as a whole . . .” Given the
23 lack of factual dispute as to the portion of Watch Tower’s works Darkspilver posted, it is clear
24 that this factor favors a finding of copyright infringement.
25

26 *vi. The effect of use on a potential market for or value of copyrighted work favors a*
27 *finding of infringement.*

28 The fourth fair use factor requires an evaluation of “the effect of the use upon the

1 potential market for or value of the copyrighted work.” 17 U.S.C. § 107(4). Courts decide
2 “whether unrestricted and widespread *conduct of the sort engaged by the defendant . . .* would
3 result in a substantially adverse impact on the potential market for the original.” *Disney Enters.*,
4 869 F.3d at 861 (emphasis added). If widespread unauthorized reproduction and display of
5 Watch Tower’s works online were permitted, there would be virtually no need to visit Watch
6 Tower’s website – JW.ORG. Diverting traffic away from Watch Tower’s website could result
7 in a significant decline in readership of Watch Tower’s content. *See Ass’n of Am. Med. Colleges*
8 *v. Cuomo*, 928 F.2d 519, 526 (2d Cir. 1991)(“This case does not present the relatively
9 straightforward situation in which the potential harm to a copyrighted work flows from direct
10 competition with the assertedly fair use. In such circumstances, we have noted our concern that
11 creation will be discouraged if demand can be undercut by copiers.”)

12
13 As Judge Kim correctly noted, “Watch Tower has not yet had a chance to conduct
14 discovery on its copyright claim or to engage an expert to conduct a market analysis.” Order, at
15 17:3-5. Thus, this Court should not “deprive Watch Tower of the opportunity to develop its
16 claim and supporting evidence before it has even filed suit.” *Id.* at 17:6-7.

17
18 Watch Tower does not carry the burden of proof on a potential fair use defense in a case
19 to which the U.S. fair use defense may not apply. Still, Watch Tower, has presented numerous
20 strong arguments to support its claim that Darkspilver’s use of its copyrighted works was indeed
21 copyright infringement – not fair use. *See Lenz*, 815 F.3d at 1153. On this basis, the motion to
22 quash should be denied.
23

24 **III. CONCLUSION**

25 Darkspilver asks this Court to ignore the fact that Watch Tower fully complied with the
26 DMCA statute and, as a matter of law, is entitled to compliance with the subpoena. He also
27 asks that firmly established federal law in this Circuit be disregarded by holding that Watch
28 Tower – despite having conducted a fair use analysis – must do more. Darkspilver argues that

1 Watch Tower must conclusively establish copyright infringement without the benefit of
2 discovery and trial. Finally, he asks the Court to impermissibly conduct a religious trial, and
3 craft its ruling by adjudicating religious doctrine. Such an approach would eviscerate the entire
4 purpose of the DMCA statute's subpoena provision. Watch Tower submits that Darkspilver's
5 requests should be rejected, his motion to quash should be denied, and Reddit, Inc. should be
6 ordered to immediately comply with the subpoena.
7

8 Dated: June 14, 2019

9 Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 14, 2019, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that a notice of the foregoing document is being served this day on all counsel of record identified below via transmission of Notices of Electronic Filing generated by CM/ECF.

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